

2107454 (Migration) [2022] AATA 2909 (8 August 2022)

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DECISION RECORD

DIVISION:	Migration & Refugee Division
REPRESENTATIVE:	Mr Francis Chu
CASE NUMBER:	2107454
MEMBER:	R. Skaros
DATE:	8 August 2022
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for an Employer Nomination (Permanent) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 186 - Employer Nomination Scheme visa: • Public Interest Criterion 4020(1) for the purposes of cl 186.213(1) of Schedule 2 to the Regulations.

Statement made on 08 August 2022 at 10:08am

CATCHWORDS

MIGRATION – Employer Nomination (Permanent) (Class EN) visa – Subclass 186 (Employer Nomination Scheme) – false or misleading information and bogus documents given with previous visa application – work history and employment reference – department’s verification checks found limited independent evidence of employment – elapse of time, cash payments, high turnover of workers and record-keeping requirements – supporting documents, statutory declaration and oral evidence – demonstrated high-level job skills and value to current employer – lack of evidence does not establish false or misleading information and bogus documents – decision under review remitted

LEGISLATION

*Migration Act 1958 (Cth), ss 5(1), 65, 375A
Migration Regulations 1994 (Cth), Schedule 2, cl 186.213(1), Schedule 4, criterion 4020(1), (3), (5)*

CASES

*Arora v MIBP [2016] FCAFC 35
Batra v MIAC [2013] FCA 274
Trivedi v MIBP (2014) 220 FCR 169*

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

4. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 21 May 2021 to refuse to grant the applicant an Employer Nomination (Permanent) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
5. The applicant applied for the visa on 16 July 2020. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl 186.213(1) of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations) because the delegate found that the applicant did not satisfy the requirements of Public Interest Criterion (PIC) 4020(1).
6. The applicant provided a copy of the delegate's decision record with the application for review.
7. On 25 January 2022, the Tribunal invited the applicant to comment on information it considered would, subject to his comment or response, be the reason for part of the reason for affirming the decision under review. The information related to the withdrawal of the nomination by the nominator ([Company 1]) in respect of the applicant. On 7 February 2022, the Tribunal received correspondence from the applicant's representative, which included a submission and letter from the nominator indicating that the applicant continues to be employed on a full-time basis and they are liaising with the Department to reinstate the nomination.
8. The applicant appeared before the Tribunal by videoconference on 19 July 2022 to give evidence and present arguments. The Tribunal also received oral evidence from [Mr A], a former work colleague of the applicant, and [Mr B], the applicant's current manager. The Tribunal hearing was conducted with the assistance of an interpreter in the [Language] and English languages.
9. The applicant was represented in relation to the review. The representative attended the hearing.
10. The Tribunal has confined its consideration to the issue of whether the applicant satisfies the requirements of PIC 4020(1) as required by cl.186.213(1).
11. The Tribunal notes that the Department's file includes a non-disclosure certificate, issued under s.375A of Act, in respect of various documents. The reasons provided in the certificate for the non-disclosure of the specified documents is that they may disclose lawful methods for preventing, detecting and investigating breaches or evasions of the law which would or likely prejudice the effectiveness of those methods. At the hearing the Tribunal invited the applicant's representative to comment on the validity of the certificate. The representative said he had no issue with the validity of the certificate and that the applicant has provided a response regarding any adverse information disclosed to him.
12. The Tribunal is satisfied that the certificate provided a valid public interest reason for non-disclosure and is therefore valid. In relation to the information covered by the certificate, the Tribunal notes that the information, in as far as it was relevant to the applicant and the issues in the review, was disclosed to the applicant by the Department in a natural justice letter and was set out in the delegate's decision record.
13. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

14. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl 186.213(1) for the grant of the visa. Broadly speaking, this requires that there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1).
15. The requirement in PIC 4020(1) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

16. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s 5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
17. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
18. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
19. In the 12 months before the Subclass 186 visa application was made, the applicant held a Temporary Work (Class UC) Subclass 457 visa. The Subclass 457 visa was granted to the applicant on 7 September 2016. As part of that application, an employment reference dated 23 May 2016 was provided which stated that the applicant had worked at [Company 2] (the business) from July 2012 to present in the position of [Job task 1]. The letter was signed by [Ms C], General Manager.
20. The Department sought to verify the applicant's employment claims as set out in the employment reference. Information in the delegate's decision record indicates that the departmental officer made multiple attempts to contact the business on their registered phone number, but the calls remained unanswered. The officer contacted the phone number listed on the applicant's work reference and was referred by a staff member to [Ms C].
21. It was noted that [Ms C] confirmed that the applicant worked for the business and that further details could be provided by the Human Resources (HR) section, details of which were provided to the officer. The officer contacted the HR section, who requested the officer to call back the following day as they required time to review their records. It was recorded that

during the follow up phone call the HR staff member confirmed that the applicant worked from July 2012 to May 2016 and that his monthly salary was [Amount 1], which was paid in cash, and that the applicant was provided with accommodation as he was not a local resident.

22. The delegate had several concerns with the information obtained during the verification checks including that there was limited independent evidence of the applicant's employment, such as a labour contract, bank payments or social security tax receipts. The delegate was also concerned that [Ms C]'s number was not registered to the business. The delegate noted that the HR person said they do not keep records beyond three years but was nevertheless able to provide information about the applicant that closely matched that which was on the employment reference. Based on those concerns, the delegate considered that the applicant had submitted information that was false or misleading in relation to his employment experience in [Country] for the purposes of his subclass 457 visa application.
23. In responding to the delegate's concerns, the applicant provided various supporting documents and a statutory declaration. The documents included a letter of appointment issued by the [Company 2] indicating that [Ms C] was appointed as General Manager of the company on 10 May 2011. The company also issued a notarised document dated 6 April 2021 stating that the applicant worked as a [Job task 1] from July 2012 to November 2016. It confirmed that the General Manager ([Ms C]) had received call from an Australian embassy and that the HR Manager, [Ms D], had also assisted with the embassy's enquiries. It stated that the HR Manager confirmed the applicant's employment, that he commenced in 2012 and that employment documents were kept for three years. It was stated that [Ms D] was not the HR Manager during the applicant's employment with the company. Also provided was a copy of the applicant's employee registration form, working certification and details of his day-to-day duties as a [Job task 1].
24. At the hearing the Tribunal asked the applicant about his education and employment history. He gave evidence that he completed up to the third year of high school. He was 18 years of age when he got his first job, which was with [Company 2]. He had a mentor when he first joined the company. He started in the [Job task 2] department and later moved to the [Job task 1] department. The applicant provided details of the tasks he undertook as a [Job task 1] and said he worked in that position until November 2016. The applicant gave evidence that he was paid [Amount 1] a month. He said he was paid in cash.
25. In response to the Tribunal's queries about the process for the Subclass 457 visa, the applicant said he registered with an agent in February 2015 and attended an interview with the representatives from [Company 1] in August 2015. In October 2015 he travelled to a factory in [Part of Country], [Company 3], where he had to demonstrate his [Job task 1] skills. He was observed [doing Job task 1] and passed the assessment. When asked about the English language requirement, the applicant said he started studying English in 2014. He did not pass the English test on the first attempt but passed on the second attempt. He was nominated for the Subclass 457 visa by [Country 1] and has been working with them in the [City] factory since travelling to Australia. The applicant said he stopped working at [Company 2] in [Country] two weeks before travelling to Australia.
26. In response to the concerns about his claimed employment in [Country], as set out in the delegate's decision record, the applicant said the factory in [Country] ([Company 2]) had a very high turnover of workers and it was understandable that the managers could not provide the information and had to check their records. He said he was issued with an employment certificate in May 2016, which he used as part of the application for the Subclass 457 visa, but he continued to work for the company until November 2016.

27. The Tribunal also had the opportunity to take evidence from [Mr A] by telephone. [Mr A] gave evidence that he is a permanent resident. He was sponsored as a [Work sector] worker by a company in Melbourne and has been working for his nominating employer since 2016. He said that he and the applicant worked together in the [Job task 1] Department at [Company 2]. [Mr A] said he started at the factory in 2010 and the applicant joined about two years later. When asked how he was paid, [Mr A] said he was paid monthly (in cash) [Amount 1].
28. The Tribunal also took evidence from the applicant's current manager, [Mr B]. [Mr B] stated that the applicant, after being granted the Subclass 457 visa, commenced work with [Company 1] in [City]. He said the applicant joined works a [Job task 2] and is one of the most valuable members of staff. [Mr B] said he was the applicant's supervisor when he started working at the facility in [City]. When asked about the applicant's level of skill when he commenced employment in Australia (in November 2016). [Mr B] said he observed the applicant, and it was quite clear that he had done that type of work ([Job task 2]) for a long time. [Mr B] said that it would be extremely difficult to replace someone who was at the same level of skill and experience as the applicant. He said they currently have over [Number] vacant positions, which has affected their productivity.
29. In submissions to the Tribunal, the representative contended that the Department's search for a phone number belonging to [Company 2] was inadequate, as the Department appears to have conducted a local search engine instead of going to either the company's official website or brochure. It was submitted that the HR employee, with whom the officer spoke, only joined after the applicant's departure from the company and that [Country] laws do not require files to be kept more than two years after an employee has left.
30. It was submitted that in the applicant's case, only his work reference and recruitment forms (as provided to the Department) were kept on file. It was submitted that there is no legal requirement for a formal labour contract in [Country], and that the recruitment form states the basic terms of employment, such as salary and work hours. It was submitted that cash payments in [Country] are very common, and under [Country] employment law/HR Policies, income tax is not required on income that is less than [Amount 2] (2011-2018) or less than [Amount 3] (2018-present).
31. The Tribunal has carefully considered all the information before it as follows.
32. The Tribunal acknowledges the concerns raised by the delegate in relation to the limited verifiable evidence of the applicant's employment, such as bank transfer of wages and tax records. However, the Tribunal notes that the applicant's claim is that he was paid in cash, which the representative submitted was common under [Country] labour laws where the income was less than [Amount 2]. The lack of independent verifiable evidence of employment does not on its own establish that a bogus document or information that is false or misleading in a material particular (about the applicant's claimed employment in [Country]) had been provided with the Subclass 457 visa application.
33. The Tribunal also acknowledges the delegate's concern regarding the HR officer having to rely on the issued reference to answer questions regarding the applicant's employment. The material before the Tribunal regarding the operations of [Company 2], indicates it is a large [Work sector] facility in [Country]. It is plausible in the circumstances, given the large number of workers that would have been employed by the facility over the years, that the HR officer, to whom the departmental officer spoke, would have had to rely on the employment reference issued to the applicant in May 2016, when verifying the applicant's employment.
34. There is no information before the Tribunal that the employment reference was not genuinely issued by [Company 2] in respect of the applicant. The notarial certificates provided to the Department about the appointment of [Ms C] as the company's General Manager and [Ms D]

as the HR Manager, confirm that [Ms C] and [Ms D] are associated with [Company 2], and the fact that [Ms D] was able to confirm the information on the employment reference suggests that the reference was issued by the company and formed part of its records.

35. The information obtained by the Department during the verification checks was not, in the Tribunal's view, sufficiently probative and cannot be relied upon, to the satisfaction of the Tribunal, to establish that a bogus document or false or misleading information about the applicant's employment claims with [Company 2] had been provided with the Subclass 457 visa application.
36. The Tribunal has also considered the applicant's evidence regarding the history of his employment with [Company 2] in [Country], including the successful demonstration of his skills as a [Job tasks 2 and 1] for the purpose of the Subclass 457 visa. The Tribunal considers that the applicant's successful completion of the skills assessment conducted by an Australian assessor, appears to support his claims to have been employed as a [Job tasks 2 and 1] in [Country]. The Tribunal also gives weight to the evidence of [Mr A], which corroborates the applicant's employment claims [Company 2]. It also considers [Mr B]'s evidence that the applicant, upon commencement of employment with [Country 1] in November 2016, demonstrated a high level of skill as a [Job task 2] to be supportive of the applicant's claims to have acquired his skills in the trade at [Company 2].
37. The Tribunal is not satisfied that there is substantive evidence before it which undermines the applicant's employment claims with the [Company 2]. For these reasons, the Tribunal cannot be satisfied that there is evidence before it that the applicant has given, or caused to be given, a bogus document or information that is false or misleading in a material particular, with the Subclass 457 visa application. Therefore, the applicant meets PIC 4020(1).
38. On the basis of the above, the applicant satisfies PIC 4020(1) for the purposes of cl 186.213(1).

DECISION

39. The Tribunal remits the application for an Employer Nomination (Permanent) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 186 - Employer Nomination Scheme visa:
 - Public Interest Criterion 4020(1) for the purposes of cl 186.213(1) of Schedule 2 to the Regulations

R. Skaros
Senior Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s 5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...